No. 2634

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

CALEDONIAN INSURANCE COMPANY et al.,

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

Brief for Defendant in Error

GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for Defendant in Error.

Filed this .....*day of November, 1915.*

FRANK D. MONCKTON, *Clerk.*

By .....*Deputy Clerk.*

THE BLAIR-MURDOCK COMPANY, 68 FREMONT ST., SAN FRANCISCO

INDEX

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BRIEF FOR DEFENDANT IN ERROR.

This case is brought here upon a record which shows that it was tried by the Court without a jury under stipulation of the parties; that no special findings were made by the court or requested by either party; that in the progress of the trial no objection or motion was made by the plaintiffs in error, and no ruling, decision or order (other than the order for judgment) was made by the court; and that no exception of any kind was taken by the plaintiffs in error. There is, therefore, nothing presented for review upon this appeal, as we shall presently point out, excepting the order of the

court below overruling the demurrer to the complaint. Under the well settled rule, neither the facts nor the conclusions of law upon which the general finding of the court below in favor of the defendant in error rests, are open for consideration.

It will be conducive to a clear understanding of the case, if, at the outset, the nature of the issues which were involved upon the first trial, and the decision of this court upon the first appeal, be considered. The plaintiffs' claim (for purposes of convenience the defendant in error will be designated herein as the plaintiff, and the plaintiffs in error as the defendants) is set forth in the complaint in four separate counts. The first states a cause of action to recover plaintiff's salary for the month of April, 1907, based upon the claim that during that month he duly performed the contract on his part. (Tr., pp. 1-10.) In the second count, it is alleged that at the end of April, 1907, and during each of the remaining eleven months of the term of the contract, defendants repudiated the contract, and unliquidated damages in the sum of $11,000 for such repudiation are prayed. (Tr., pp. 10-13.) The theory upon which the third cause of action is based, is that the plaintiff duly performed the contract on his part during the last eleven months of the term thereof. (Tr., pp. 13-15.) The fourth count alleges the payment by plaintiff, at the instance and request of the defendants, of the sum of $237.45, representing commissions upon certain return

premiums, and prays for judgment against the defendants in that amount. (Tr., pp. 15-17.)

It will be noted from what has been said that the second and third counts—though proceeding upon theories which are entirely distinct—relate to and cover the same period of time, i. e. the eleven months elapsing from the end of April, 1907, to the end of the term of the contract (March 31st, 1908). They are, however, inconsistent, since the second count states a cause of action for the *repudiation* of the contract by the defendants at the end of April, 1907, and during each of the remaining months of the term of the contract, and prays for unliquidated damages therefor, while the third count proceeds upon the theory of *performance* of the contract during that period by the plaintiff, and alleges as the breach that defendants failed to pay the agreed compensation. This course of pleading the same cause of action in different and inconsistent counts—it may be stated parenthetically—was proper under the authorities, and plaintiff could not have been required to elect upon which count he would proceed, but he was entitled to have the case submitted upon both theories.

Rucker v. *Hall,* 105 Cal. 429.
Stockton, etc., Works v. *Glenn Falls Insurance Co.,* 121 Cal. 171.
Van Lue v. *Wahrlich-Cornett Co.,* 12 Cal. App. 749, 752.

At the first trial, however, the case was submitted to the jury upon the theory of performance only, and not upon the theory of repudiation, the court charging the

jury at the request of defendants that the plaintiff had "elected to rely upon his performance." (199 Fed. 410.) "The case," this Court said in its opinion upon the former appeal, "was tried upon the theory that Levy "performed his part of the contract, covering the sec- "ond year as well as the first." (199 Fed. 411.) In other words, at the first trial, the second count—which is the count wherein it is sought to recover unliquidated damages for defendants' repudiation of the contract—was not involved.

The jury found in favor of the plaintiff, and judgment was accordingly entered in his favor. This judgment was reversed by this court upon the ground that plaintiff having retained since the month of June, 1907, fifteen per cent. of the amount of premiums collected by him to cover office expenses, failed to perform the contract during the period such retention continued. Appreciating that this decision established the "law of the case" against plaintiff's theory set forth in the third count, at the last trial plaintiff's counsel disclaimed the right to recover under that count, and proceeded under the first, second and fourth counts of the complaint. (Tr., fol. 66.) The issues, therefore, at the first trial and the matters determined by this court upon the former appeal were entirely different from those which were involved upon the last trial; and the "law of the case," as established on the former appeal, does not affect any position of plaintiff at the last trial, or upon this appeal. On the contrary, the decision upon the first appeal tends merely (as we shall presently point

out) to confirm the correctness of the conclusion of the learned judge of the court below, respecting plaintiff's right to recover upon the present theory. We may add, also, in this connection—in view of defendants' contention that by relying at the first trial upon one of the inconsistent counts, plaintiff is precluded from now relying upon the other—that the authorities are otherwise.

Agar v. *Winslow*, 123 Cal. 590;
Brown v. *Fletcher*, 182 Fed. 973 (C. C. A. 6th Cir.).

At the last trial, the cause was submitted to the court without a jury upon the evidence taken at the first trial, supplemented by additional evidence offered by plaintiff. Notwithstanding we think it clear, as already suggested, that the state of the record precludes any inquiry into either the facts or the conclusions of law upon which the general finding in plaintiff's favor rests, we shall, without waiving our claim in that regard, briefly refer to the facts as established in the pleadings and by the evidence introduced at the trial.

I.

Facts.

On March 31, 1906, the parties entered into the contract set forth in the fourth paragraph of the complaint. (Tr., pp. 2, 3.) This contract, by its terms, was to remain in force during the period of two years commencing with the first day of April, 1906. In June, 1906, the

defendant companies took the position that the consideration for the agreement had failed in a material part because of the earthquake; and on June 21, 1906, they announced to Levy in a letter that the contract was rescinded (Tr., p. 83). Levy did not assent to the rescission of the contract, and during the entire first year thereof he performed it on his part in every particular. At the end of each month during the first year, demand was made upon the defendant for the one thousand dollars due for that month. (Tr., p. 82.) Mr. Conroy, defendants' manager, testified that his reply was: "We could not pay it; the contract was rescinded." (Tr., p. 82.)

During the first year of the contract, actions were commenced by Levy in the Superior Court to recover his salary for the several months making up that year. These cases were pending during the entire second year of the contract, the decision of the Supreme Court affirming the judgment of the Superior Court in Levy's favor not having been rendered until November, 1909. At all times during the pendency of these actions, the defendants steadfastly maintained their old position with respect to the contract, "claiming and asserting," as alleged in paragraph VIII of the complaint and not denied in the answer, "that the said agreement was no longer in force or effect and that they would not perform on their part, any of the obligations thereof." (Tr., p. 5.) That this was the position of the companies during the entire second year of the contract clearly appears, also, from the statement of defendants' counsel,

made in reply to the question of plaintiff's counsel as to whether, in April, 1907, it was his position and that of the defendant companies that the contract had been rescinded and did not bind the latter. Mr. Van Ness, in this connection, said: "That has always been my "position and I so advised the companies and they pro- "ceeded on that advice by reason of the destruction of "San Francisco the law gave us the right to rescind the "contract." (Tr., p. 84.)

On April 27, 1907, during the pendency of the litigation in the Superior Court, and while the defendants were still making their claim that the contract was not binding upon them, plaintiff, by his counsel, wrote defendants a letter in which it was stated that "if they "still refused payment, and still persisted in claiming "that the said contract had been rescinded, he would "consider that they had committed a breach of the con- "tract and would sue them once and for all for dam- "ages." (Tr., p. 78.) Defendants replied under date of April 29th, stating in effect that they would continue to maintain their old position and would accept the views of their own counsel and seek the legal determination of the matters in dispute; and that if the courts should *"ultimately* determine that the destruction of the principal part of San Francisco, by reason of which destruction the plaintiff's ability to perform the contract between himself and the companies was destroyed, did not release the companies from their obligation under that contract, then plaintiff will be paid the one thousand dollars per month which he is *now*

seeking to recover." (Complaint, paragraph XVI.) The legal determination spoken of in the letter could not have been had until after the contract would have expired. (Tr., p. 68.) In the following month (May, 1907), plaintiff, acting upon this announcement of the defendants' position, commenced his action in the Superior Court to recover $24,000 as unliquidated damages on account of defendants' repudiation of the contract. Upon the dismissal of that action, he commenced this action, wherein, as already stated, he again asserted his right to recover because of defendants' repudiation of the contract. Both the evidence and the admissions made in the pleadings establish beyond question that defendants at all times after June, 1906, and until the end of the term of the contract, continued to repudiate the contract—not merely, as suggested in the brief of plaintiffs in error, by failing to pay the agreed compensation, but by repeatedly claiming and asserting, during the entire period, that it had been rescinded and was not in force, and that they would not be bound thereby. (Complaint, para. VIII, Tr., p. 5; Complaint, para. XVI, Tr., p. 11; Complaint, para. XI, Tr., p. 8; Tr., pp. 83, 84.)

During the second year of the contract, the plaintiff placed in Mr. Conroy's office all of the insurance he was able to secure, and in April, as in the previous year, he remitted to defendants all of the premiums collected by him without deduction. In June, 1907, however, he commenced, for the first time, to deduct 15 per cent thereof to cover office expenses, and he continued this

practice at all times thereafter until the end of the term of the contract. The effect was, as held by this Court upon the former appeal (199 Fed. 407),—and this is now the "law of the case"—that he did not perform the contract during the period this practice continued. The deduction made in June included the premiums upon policies issued in April. Mr. Conroy, however, testified at the last hearing of the case, that premiums were not due until between forty-five and sixty days after the issuance of the policy. (Tr., p. 82.)

It thus appears that plaintiff's breach, if any, as it affected the claim for April salary, occurred *after* the April salary became due under the terms of the contract. No claim is made that plaintiff did not fully perform everything required to be performed by him up to the end of April, 1907.

We pass, now, to a consideration of the nature of the questions which may be reviewed upon this appeal. As already stated, we think it clear that the sole matter open for review concerns the sufficiency of the complaint.

II.

NEITHER THE FACTS NOR THE CONCLUSIONS OF LAW UPON WHICH THE JUDGMENT IS BASED ARE REVIEWABLE, FOR:

(1) THE CASE WAS TRIED BY THE COURT WITHOUT A JURY, UNDER STIPULATION OF THE PARTIES, AND NO SPECIAL FINDINGS WERE MADE BY THE COURT;

(2) THE RECORD CONTAINS NO RULING, DECISION OR ORDER MADE DURING THE PROGRESS OF THE TRIAL, AND NO ASSIGNMENT OF ERROR IN RESPECT THERETO.

Each of these propositions will be considered briefly in the order stated.

(1) *The case was tried by the court without a jury, under stipulation of the parties, and no special findings were made by the court.*

That under these circumstances the general finding in favor of plaintiff is not open to review, is thoroughly well established by the authorities. In some particulars, the evidence in the case at bar is conflicting. But even if it were not, it is well settled that the rule above referred to would be applicable. As said by Mr. Justice Brewer in *Lehner* v. *Dickson,* 148 U. S. 77, "The burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony."

Boardman v. *Toffey,* 117 U. S. 271;
Martinoon v. *Fairbanks,* 112 U. S. 670;
Humphreys v. *Third National Bank,* 75 Fed. 855; C. C. A. 6th (Taft, J.);
Kentucky, etc., Co. v. *Hamilton,* 63 Fed. 93; C. C. A. 6th (Lurton, J.);
Distilling Co. v. *Gottschalk Co.,* 66 Fed. 609, 610; (C. C. A. 7th Cir.);
White v. *Chase,* (C. C. A. 8th). 201 Fed. 896; (C. C. A. 8th Cir.);

National Surety Co. v. *U. S.*, 200 Fed. 142; (C. C. A. 8th Cir.).

(2) *The record contains no ruling, decision or order made in the progress of the trial, and no assignment of error in respect thereto.*

We invite the attention of the court, in this connection, to the assignments. (Tr., pp. 94-97.) The first five concern questions of pleading merely. No consideration, therefore, need be given them in this connection. Assignments 6 to 14 inclusive, are all in substantially the same form. None of them are predicated upon any ruling, decision or order made by the court; and all, we submit, are of such general character—stating as they do, merely that "the court erred in rendering its decision in favor of plaintiff, etc."—that they raise no questions which are reviewable on this appeal.

Rule 11 U. S. Circuit Court of Appeals, Ninth Circuit;

National Surety Co. v. *U. S.*, 200 U. S. 142; (C. C. A. 8th);

Chicago, etc., Co. v. *Bomberger,* 130 Fed. 884; (C. C. A. 7th). ("That verdict was contrary to law.")

Ireton v. *Pennsylvania Co.,* 185 Fed. 84, 86; (C. C. A. 5th).

III.

The Assignments of Error in Respect to the Pleadings Should Be Overruled.

We have shown that the record neither discloses any ruling, order or decision at the trial, nor any assignment

in respect thereof, and that the only rulings and assignments which are open to review upon this record are those in relation to the pleadings. The assignments in this connection are:

1. That the court erred in overruling the demurrer to the original complaint. (Tr., p. 94);

2. That the court erred in denying the motion of defendants to strike out portions of the original complaint. (Tr., p. 94);

3. That the court erred in overruling the demurrer to the amended complaint. (Tr., p. 94);

4. That the court erred in denying the motion of defendants to strike out portions of the amended complaint. (Tr., p. 95);

5. That the court erred in granting plaintiff leave to file his amended complaint. (Tr., p. 95.)

In view of the fact that the brief of plaintiffs in error contains little more than a passing reference to these assignments, we think we should be justified in passing them by without argument. We shall, however, endeavor briefly to point out why we believe each assignment is untenable and should be overruled.

Assignments 3 and 4 may be summarily disposed of by the statement that the record shows that no demurrer or motion was interposed to the complaint as amended. Assignment 5 may likewise be shortly disposed of, since the record shows no objection or exception by defendants to the order granting leave to file the amendment to the complaint, and no error in respect thereof.

Neither is any consideration of assignment 2 required for the reason that the record fails to show what portions of the complaint defendants sought to strike out, or that the court committed any error in denying their motion in that regard, or that any exception was taken by defendants to such ruling.

With these eliminations, there remains for consideration only the question whether the court erred in overruling the demurrer to the complaint. The record shows that after the demurrer was interposed by the defendants, the complaint was amended and that no demurrer to the amended complaint was interposed by defendants. This circumstance, of itself, would seem to render unnecessary any consideration of the questions arising out of the order of the court upon the demurrer to the original complaint.

Passing this consideration, however, it is apparent that the court did not err in overruling the demurrer. Each of the counts of the complaint is attacked by general demurrer only; while the complaint, as a whole, is attacked both by general demurrer and upon the ground of an alleged uncertainty based upon the fact that in the second count an amount is asked as damages for the defendants' repudiation of the contract, which is different from the amount prayed for in the third count. The demurrer to each of the counts will be first considered, and afterwards, the demurrer to the complaint as a whole.

As to the first count. In this count, as already stated, plaintiff claims to recover one thousand dollars as salary

for the month of April, 1907, it being alleged that he duly performed, etc. (Tr., par. 15, p. 9.) That this count adequately sets forth a cause of action seems so clear that we submit the matter without further discussion or citation of authority.

As to the second count. In this count, plaintiff seeks to recover the sum of eleven thousand dollars as unliquidated damages on account of defendants' repudiation of the contract at the end of April, 1907, which was persisted in during each month thereafter until the end of the term of the contract.

The principle of law upon which this count is based, and upon which we claim we are entitled to recover, is that when two persons have entered into a contract involving reciprocal obligations to be performed at a future time, and one of the parties repudiates the contract and gives notice that he will not be bound thereby, nor perform the same on his part, the other is entitled, if he pleases, to treat the repudiation as a final and total breach of the contract and to commence an action for unliquidated damages.

Civil Code, section 1440;
Hale v. *Troutt,* 35 Cal. 229;
Scribner v. *Schenkel,* 128 Cal. 250, 253;
Pierce v. *Lukens,* 144 Cal. 397, 400, 401;
Flynn v. *Mowry,* 131 Cal. 481, 486;
Remy v. *Olds,* 88 Cal. 537;
Howard v. *Daley,* 61 N. Y. 285;
Nichols v. *Scranton,* 137 N. Y. 471; 33 N. E. 564; per Peckham, J.;

Pierce v. *Tennessee*, 173 U. S. 1, 12; per Gray, J.;
Parker v. *Russell*, 133 Mass. 74;
Marks v. *Reghan*, 85 Fed. 853, per Wallace, J.;
In re Silverman, 101 Fed. 221;
Lakeshore, etc., Co. v. *Richards*, (Ill.) 30 L. R. A. 50.

It is quite true that defendants alone could not by repudiation of the contract put an end to it. The termination of the contract could only be effected by both parties—as it is said in the decisions—by the plaintiff *adopting* the renunciation,—and he could elect to adopt it or not, as he chose. The repudiation first occurred in June, 1906. It was persisted in by month by month, until the Supreme Court decided against the defendants in December, 1909, nearly two years after the term of the contract had expired. (Tr., pp. 12, 5, 6, 8.)

Mr. Levy did not adopt the renunciation of the defendants in June, 1906, nor until near the end of April, 1907, at which time he gave them notice of his intention to adopt their repudiation if persisted in. (Tr., pp. 77, 78.) They replied, in effect, that they would maintain the position which they had taken until the courts should *ultimately* hold that it was untenable; that they would accept the views of their own counsel, and would "seek the legal determination of the question in dis-"pute." (Tr., p. 11.) Such determination, it is shown by the record, could not have been had until after the expiration of the term of the contract. (Tr., p. 12.) In their letter, the defendants added that "if the courts "should *ultimately* determine that the destruction of the

" greater part of the City of San Francisco, by reason of " which destruction plaintiff's ability to perform the " contract between himself and the companies was de- " stroyed, does not release the companies under that " contract, then the plaintiff will be paid the $1,000 per " month which he is *now* seeking to recover," referring undoubtedly to the action then pending covering plaintiff's salary for the first year. (Tr., p. 11.)

The complaint further alleges that the defendants at all times after April, 1907, "persisted in claiming and asserting that the said contract had been rescinded and was no longer in force or effect, and at all times continued to repudiate the same on their part and refused to be bound thereby, etc." (Tr., p. 12, para. XVII); that "at all times until the decision of the Supreme Court of the State of California hereinafter referred to, the defendants persisted in claiming and asserting that the said agreement was no longer in force or effect, and that they would not perform on their part any of the obligations thereof and wholly repudiated the said agreement and refused to be bound thereby, and failed to perform the same in whole or in part (Tr., p. 5, para. VIII); that such repudiation was repeated in the answers filed by defendants in the litigation in the Superior Court (Tr., p. 6, para. IX), and that defendants also "in briefs filed in the said Superior Court and in a petition for rehearing after judgment had been rendered therein, claimed and asserted, as claimed by them in their answer in the said Superior Court, that the said agreement was no longer binding upon them and that the same had been rescinded." (Tr., p. 8, para. XI.)

Accordingly, in May, 1907, Mr. Levy commenced his suit as for a total breach and renunciation of the contract, and for all damages accrued and to accrue. (Tr., p. 12.) This was an adoption by plaintiff, in May, 1907, in conformity with his letter, of the defendants' repudiation then still persisted in and reaffirmed by their letter of April 29, 1907.

It is suggested in the brief of plaintiffs in error—rather than argued—that Levy, not having adopted the repudiation in June, 1906, could not do so in May, 1907. But there was a continuing renunciation each month, and a continuing refusal to pay his salary each month, and it would seem plain that as he had a remedy each month he could select any the law allowed. He could, in May, 1907, for the first time, cease to treat their renunciation as *brutum fulmen* (L. R. 16 Q. B. D. 473), and then treat it as serious, and consider the defendants guilty of a final breach.

Canada, etc., Co. v. *Flanders,* 165 Fed. 321.

We submit, therefore, that the second count states a cause of action to recover unliquidated damages sustained by plaintiff by reason of defendants' repudiation of the contract. The only argument in reference to the sufficiency of the complaint which is advanced in the brief for plaintiffs in error, may be found on page 22 of their brief, where it is stated that the "complaint does not allege either performance or non-performance of the contract on the part of Levy." This argument, it is clear, ignores the fact that the doctrine of repudiation is entirely distinct from the doctrine of prevention of per-

formance. A repudiation will give rights to a cause of action before performance is due, and therefore before it could have been prevented. For that reason the notice that the "party will not perform the contract on his part" (C. C. Sec. 1440) need not be accompanied by any prevention of performance. See *Hochester* v. *de la Tour,* 22 L. J. Q. B. 455, and other English cases, on the subject.

It is true that in some of the cases the distinction which has been adverted to has not been kept in mind, and repudiation has been spoken of as involving a prevention of performance. The sense in which this term is used in these authorities is shown in the well considered case of *Lakeshore Ry. Co.* v. *Richards,* 152 Ill. 590; 30 L. R. A. 33, from which we quote the following:

> "Stress is laid by counsel upon the words 'prevented from going on' . . . *The same language . . . i. e. that the suing must be prevented from performance has been used in numerous cases, but whether the attention of the Court has been directly called to the sense in which the word has been used, it has been held not to mean that there must be physical prevention, but that any acts, conduct or declaration of the party evincing a clear intention to repudiate the contract and to treat it as no longer binding, are a legal prevention of performance.* After some further discussion, the opinion proceeds: *"Without further quotation from cases, it seems clear both upon principle and authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by*

his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect a prevention of performance by the other party and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the parties that he will no longer be bound, or by acts and conduct which clearly evidence that that determination has been reached and is being acted upon."

(Italics throughout this brief are ours.)

The result of the authorities, both English and American—and no case holding to the contrary has been cited—is that where there has been a repudiation of a contract, a cause of action in favor of the innocent party at once arises, and that if one chooses to say that prevention of performance is necessary in such cases, the repudiation is a prevention. (30 L. R. A. 48.) Moreover, the complaint clearly shows that the repudiation was never "retracted," but was persisted in by defendants month by month until after the expiration of the contract. Performance by plaintiff was therefore excused. (C. C., Sec. 1440.)

As to the third count. This count, as well as the second, concerns the period from the end of April, 1907, to the end of the term of the contract. Unlike the second count, however, it proceeds upon the theory of *performance* by plaintiff. Upon this count, plaintiff relied at the first trial, and, as pointed out above, this court held that the evidence did not establish perform-

ance on his part. Since this count was not involved upon the last trial, and we do not claim the right to recover thereunder, it may be dismissed from consideration. Very clearly, however, it does set forth a cause of action based upon the theory of performance.

As to the fourth count. In this count plaintiff seeks to recover $237.45, representing commissions on return premiums which had been advanced and paid by plaintiff at the instance and request of defendants. That the general demurrer interposed to this count was correctly overruled requires, we think, no argument.

As to the demurrer to the complaint as a whole. In addition to the foregoing points, the demurrer points out an alleged ambiguity in the complaint growing out of the circumstance that the amount demanded in the second count differs from that demanded in the third. However, it is elementary that each count must be considered by itself and apart from the others, and the allegations of one count cannot be invoked to show an ambiguity or inconsistency in another.

Stockton, etc., Co. v. *Glenn Fall Insurance Co.*, 121 Cal. 171.

It is, therefore, respectfully submitted that the demurrer to the complaint was properly overruled.

IV.

ASSUMING, SOLELY FOR THE PURPOSES OF THE ARGUMENT, THAT THE FACTS AND CONCLUSIONS OF LAW UPON WHICH THE COURT BELOW BASED ITS GENERAL

FINDING IN FAVOR OF PLAINTIFF ARE OPEN TO REVIEW UPON THIS APPEAL, SUCH GENERAL FINDING WAS PROPER, AND THE ONLY ONE WHICH THE EVIDENCE WARRANTED.

We have pointed out above that since the case was tried by the court without a jury under stipulation of the parties, and no special findings were made, neither the facts nor the conclusions of law upon which the general finding in favor of plaintiff was based are open to review, and that the sole question presented by the record is whether the demurrer to the complaint was properly overruled. We propose now to assume, solely for the purposes of the argument, that the scope of the appeal is not so limited and to show that the general finding of the court is amply sustained by the evidence.

We pass, first, to a consideration of the cause of action based upon defendants' repudiation of the contract (second count), for that is the only count which is discussed in the brief of plaintiffs in error. Afterwards, the count relating to plaintiff's salary for the month of April, 1907 (first count), and the count relating to the commissions on unearned premiums which were paid out by plaintiff at defendants' request (fourth count) will be considered.

1. *The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover upon the ground of defendants' repudiation of the contract during the last eleven months of the term thereof.*

The principle of law upon which the second count—

the one wherein defendants' repudiation of the contract is the gravamen of the cause of action—is based, has already been stated. It is that when two persons have entered into a contract involving reciprocal obligations to be performed at a future time, and one of the parties repudiates the contract and gives notice that he will not be bound thereby, nor perform the same on his part, the other is entitled, if he pleases, to treat the repudiation as a final and total breach of the contract and to commence an action for unliquidated damages.

See authorities cited, *supra*, pp. 14, 15.

It is quite true, as already stated, that defendants alone could not by repudiation of the contract put an end to it. The termination of the contract could only be effected by both parties—as it is said in the decisions—by the plaintiff *adopting* the renunciation,—and he could elect to adopt it or not, as he chose. The repudiation first occurred in June, 1906. It was persisted in month by month, until the Supreme Court decided against the defendants in December, 1909, nearly two years after the term of the contract had expired.

Mr. Levy did not adopt the renunciation of the defendants in June, 1906, nor until near the end of April, 1907, at which time he gave them notice of his intention to adopt their repudiation if persisted in. (Tr., p. 78.) They replied, in effect, that they would maintain the position which they had taken until the courts should *ultimately* hold that it was untenable; that they would accept the views of their own counsel (these views, it may be said in passing, are set forth above

(p. 7) in their counsel's own language, and were, of course, well known to Mr. Levy and his counsel), and would "seek the legal determination of the question in dispute." Such determination, it is shown by the record, could not have been had until after the expiration of the term of the contract. (Tr., p. 68.) In their letter the defendants added that "if the courts should *ultimately* determine that the destruction of the principal part of the City of San Francisco, by reason of which destruction plaintiff's ability to perform the contract between himself and the companies was destroyed does not release the companies under that contract, then the plaintiff will be paid the $1,000 per month which he is *now* seeking to recover," referring undoubtedly to the action then pending covering plaintiff's salary for the first year. (Tr., p. 11.)

Accordingly, in May, 1907, Mr. Levy commenced his suit as for a total breach and renunciation of the contract, and for all damages accrued and to accrue. (Tr., p. 12.) This was an adoption by plaintiff, in May, 1907, in conformity with his letter, of the defendants' repudiation then still persisted in and reaffirmed by their letter of April 29, 1907.

That Levy, though he had not adopted the repudiation in June, 1906, could nevertheless do so in May, 1907, is clear. There was a continuing renunciation each month, and a continuing refusal to pay his salary each month, and it would seem plain that as he had a remedy each month he could select any the law allowed.

He could, in May, 1907, for the first time cease to treat their renunciation as *brutum fulmen* (L. R. 16 Q. B. D. 473), and then treat it as serious, and consider the defendants guilty of a final breach.

Canada, etc., Co. v. *Flanders,* 165 Fed. Rep. 321.

It is said, however, that notwithstanding the letters referred to and the commencement of the action by plaintiff in May, 1907, plaintiff did not elect to adopt defendants' renunciation of the contract, since after April, 1907, he placed his business with defendants. It is the "law of the case," however, that plaintiff did *not* perform during the period he deducted the fifteen per cent. That he continued business relations with defendants after April, 1907, is entirely immaterial. He was not obliged to move to some other city, or to refrain from all relations with the companies. It is enough that the transactions which he had with defendants after the end of April, 1907, were not had *under the contract,* and, as now firmly established as the "law of the case," did not constitute performance thereof.

Defendants cannot claim that they received the business placed with them by plaintiff during this period under a contract, the existence of which they at all times denied; nor can they be permitted now to assert what this court has denied, viz.: that plaintiff in fact performed the contract during the period under discussion. We need go no further upon this point, however, than the answer of defendants in this case, wherein they allege that "the fire insurance business which he (plain-" tiff) did bring to the office of the defendants, *he*

"*brought as a commission broker, retaining and deduct-*
"*ing from the premiums collected by him such com-*
"*missions as are allowed all brokers,*" and further that
"*such business was brought upon a commission basis,*
"*such as is allowed and is the custom with all agents,*
"*and not under the terms of the contract which the*
"*plaintiff failed, refused and neglected to perform in*
"*any part whatsoever.*" This clearly shows defendants' understanding and purpose in receiving the business placed with them by Levy during the period in question.

Defendants' own admission, therefore, as well as all of the evidence in the case, is against the claim now made. It would be enough, in this connection, to refer to the letter of April 27, 1907, and to the fact that immediately thereafter plaintiff commenced his action in the Superior Court upon the renunciation. Unquestionably, these facts show an adoption by plaintiff of the renunciation and an intention to act thereon. Plaintiff's intention in April and May, 1907, is thus evident, and in the absence of clear evidence showing that he changed his intention, it must be presumed that it continued thereafter unchanged. (C. C. P., Sec. 1963, Subd. 32.) In addition to all this, the record shows that the suit upon the renunciation was at all times prosecuted by plaintiff until it was dismissed by the Superior Court after the expiration of the term of the contract; whereupon this action was brought in this Court. This, certainly shows no abandonment of purpose. Moreover, as we have pointed out, the fact is now established

as the "law of the case" that plaintiff did not in fact perform during the period in question. There is no evidence opposed to all this, and the court therefore properly found that plaintiff at no time changed his purpose to adopt defendants' renunciation and hold them thereon.

It is true that the character of the business done with defendants after the end of April, 1907, and the procedure followed in transacting it was much the same as before that date; but this is far from showing that it was therefore done *under the contract.* With whomsoever plaintiff did business, the nature and course of business would have been substantially the same. If A sells B an article and before delivery B repudiates his contract, declaring that it was never executed, or that it has been rescinded, A has his action against B as for a repudiation of the contract; and he does not waive it because B afterwards accepts the article under some other arrangement, or upon some other terms. Obviously, after the repudiation, A is not cut off from all business relations with B, at the risk of losing his right of action. It is equally clear that when B accepts the article, at the same time asserting that he does not do so under the old contract, the existence of which he denies, he cannot afterwards be heard to claim that he in fact received it under such contract.

The Civil Code (Sec. 1440) says that if a party to an obligation gives notice to another before the latter is in default, that he will not perform the same upon his part, *and does not retract such notice before the time at which*

performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party. In the present case it is not pretended that the notice given by defendants was ever retracted. It follows that plaintiff is entitled to maintain this action.

The transactions had between plaintiff and defendants after April, 1907, are material only as they relate to the measure of damages; for the defendants are, of course, entitled to a credit for whatever amount was, in fact, earned, or could have been earned by plaintiff during the period of the breach. It was plaintiff's duty, as stated by the trial Court during the hearing, to mitigate defendants' loss and reduce their damages as much as possible. This he did by continuing his employment, securing all the busines he could and placing it with the defendant companies.

That plaintiff received commissions during this period from defendants, rather than from other insurance companies, is entirely immaterial. Obviously, it was greatly to their benefit that he should have placed the business with them, rather than with other companies. Whether plaintiff had placed the business with the defendants or with others, the amount of the commissions received by him must be deducted from the $11,000 claimed as damages under the second count, and such amount was, in fact, deducted by the court in determining the amount of the judgment. The correctness of this measure of damages was expressly conceded in the

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lower Court by counsel for defendants when the question whether the case should be tried by a jury or by the Court without a jury was under discussion. (Tr., p. 87.)

Schroeder v. *Cal. Yukon Trading Co.*, 95 Fed. 296 (De Haven, J.)

It may be observed in passing that section 1440 of the Civil Code says that repudiation makes it unnecessary that the innocent party should perform, or offer to perform, "any conditions" upon his part to be performed. And so are all the authorities.

Gray v. *Smith* (C. C. A. 9th Cir.) 83 Fed. 825, Gilbert, J;

Stakes v. *Mackay* (N. Y.) 41 N. E. 499.

It is also urged that, notwithstanding defendant's repudiation of the contract, plaintiff was not *prevented* from performing; and from this the conclusion is drawn that he was therefore required to perform. We think that the Code section referred to is a sufficient refutation of this contention; for all that it requires is a notice, unretracted, that the party "will not perform the contract upon his part." If these conditions exist the innocent party, in the language of the statute, is entitled to sue "without previously performing or offering to perform any conditions upon his part in favor of the former party." It was not necessary that the notice should have been accompanied by any actual prevention or performance.

It may be true that defendants were willing to accept Levy's business, inasmuch as they had announced their intention not to pay for it. But they were never ready

to accept it *under the contract.* That they were willing to accept it without paying for it, or upon terms different from those provided in the contract cannot strengthen their position, or render their repudiation of no effect.

Before leaving this branch of the argument, it is proper to point out that the doctrines of repudiation and prevention of performance are entirely distinct. A repudiation will give rise to a cause of action before performance is due—before it is possible under the contract—and therefore before it could have been prevented. It is not necessary, therefore, that "the notice that the party will not perform the contract upon his part" (C. C., Sec. 1440) should be accompanied by any prevention of performance.

Repudiation means only a renunciation of the obligations of the contract. In *Roehm v. Horst,* 178 U. S. 8, Chief Justice Fuller states the doctrine to be that "if "a contract provides for a series of acts, and actual de- "fault is made in the performance of one of them, "*accompanied by a refusal to perform the rest,* the "other party need not perform but may treat the refusal "as a breach of the entire contract, and recover accord- "ingly." It is the declaration of the party that he will not perform any of the obligations of the contract to be performed on his part that gives rise to the cause of action. It is not necessary that the renouncing party should go further and declare that he will not *receive* performance from the other party. He may be quite willing—and naturally in all cases would be—to re-

ceive whatever the other party would render, without giving any equivalent or performing any of the obligations of the contract to be performed by him. But this willingness on his part does not destroy the effect of his renunciation of the obligations of the contract. If one gives "notice that he will not perform on his part" (C. C., Sec. 1440)—if, in the language of Judge Fuller, his breach of one provision of the contract is "accompanied by a refusal to perform the rest"—the innocent party may sue and recover his damages without either performing, or tendering performance.

Any other rule would require that the innocent party, notwithstanding the other's repudiation of the contract, should, during the entire term of the contract extending perhaps over years, either perform, or hold himself in readniess to perform, knowing all of the time the other would not perform, and that he would at the end be compelled to resort to a lawsuit and take his chances of being able to satisfy any judgment which might be obtained by him. In the avoidance of these consequences, and in the fact that the damages of the party renouncing his contract may be thereby greatly mitigated, the doctrine of repudiation has its principal justification.

Notwithstanding, as has been said, that the doctrines of "repudiation" and "prevention of performance" are entirely distinct, it is true, as already pointed out, that in some of the cases this fact has not been kept in mind, and repudiation is spoken of as involving a prevention of performance. The sense in which the term "prevention

of performance" is used in this connection may, however, be seen from the following quotation from the case of *Lakeshore Ry. Co.* v. *Richards*, 152 Ill. 59; 36 L. R. A. 33, where it is said:

> "Stress is laid by counsel upon the words 'prevented from going on' . . . *The same language . . i. e., that the suing must be prevented from performance has been used in numerous cases, but whether the attention of the Court has been directly called to the sense in which the word has been used, it has been held not to mean that there must be physical prevention, but that any acts, conduct or declarations of the party evincing a clear intention to repudiate the contract and to treat it as no longer binding, are a legal prevention of performance.*

After some further discussion, the opinion proceeds:

> *"Without further quotation from cases, it seems clear, both upon principle and authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the parties that he will no longer be bound, or by acts and conduct which clearly evidence that that determination has been reached and is being acted upon."*

We submit, therefore, that plaintiff was entitled to judgment under the second count of the complaint. The amount of his damages thereunder, as was agreed by defendants' counsel in the court below, is the difference between $11,000 and $3588.88 (the amount received by him as commissions upon the business of the second year) or $7411.12, together with interest.

2. *The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover his salary for the month of April,* 1907.

We pass, now, to a consideration of plaintiff's cause of action to recover the salary for April, 1907.

Since, under the contract, plaintiff's salary was payable to him "monthly," the April salary was due on the last day of that month. (*Webster* v. *Cook,* 38 Cal. 433.)

It is conceded that the first default on his part occurred in June following, and that in April all premiums were remitted without deduction. Insofar, therefore, as concerns anything required to be done by plaintiff prior to April 30th, 1907, it is admitted that it was fully performed.

It is proper in this connection, and while considering the question whether the withholding in June of fifteen per cent. of the April premiums deprives plaintiff of the right to recover his salary for April, to observe that the contract imposed no duty upon the plaintiff to collect and remit the premiums in question, and that the record shows that this is *res adjudicata* between the parties and cannot therefore be disputed by either of them. If it were permissible to add entirely new

terms to a written and unambiguous contract by showing a course of conduct between the parties, or even a general custom, (which we deny: *C. C. P. Sec. 1870,* Subd. 12; *Withers* v. *Moore,* 140 Cal. 597), it is at least clear that this cannot be done in the present case; for it was expressly found in the action in the Superior Court that *"the written agreement aforesaid contained "all the agreements and understandings of the parties."* (Tr., p. 7.) This finding and determination, we respectfully submit, is, of itself, a sufficient answer to the contention that the April salary was not earned, because of the deduction made by plaintiff in June.

But if this question is not *res adjudicata* here, it is at least clear that the absence of any provision in the agreement for collection and remission of premiums, points very strongly to the conclusion that the collection and remission thereof could not have been intended by the parties as a condition precedent to the right of plaintiff to recover the salary in question. It is well established that conditions precedent are not favored in the law and that the presumption is always against a provision in a contract having been intended by the parties as such (*Diepenbrock* v. *Luiz,* 159 Cal. 718); and where the parties have entirely failed to include a provision in their written contract (even though under some proper rule of construction it may be read into it by the courts), the conclusion is almost inevitable that it could not have been intended as a condition precedent. As said in *Ridpath* v. *Evening Express Co.,* 4 Cal. App. 367;

> "At law it was only where the obligation broken by the plaintiff was a condition precedent to defendant's obligation that the breach was a defense. Nor was any obligation of the contract regarded as a condition precedent unless made so by the express terms of the contract, or by necessary implication. (1 Chitty's Pleadings, 121, 322; Civ. Code, secs. 1439, 1498; Code Civ. Proc., Sec. 457; Anson on Contracts, 287, 303 et seq., 308 et seq., 376 et seq.) *But here the obligation broken is not expressed in the contract and was probably not thought of by the parties, but is a merely implied obligation added to the contract by construction of law.* (Civ. Code, secs. 1643, 1655, 1656.) *It could not, therefore, have been regarded by the parties as a condition precedent to the defendant's obligation.*"

There are, however, other and very potent facts which point even more strongly to the conclusion that the payment in June was not intended as a condition precedent to the obligations of defendants, to pay the April salary. Mr. Conroy's testimony showed that it was not expected of plaintiff that the premiums upon policies issued in April should be paid until between forty-five and sixty days thereafter. (Tr., p. 82.) The time for the payment of the salary was, however, definitely fixed by the contract at the end of the month. *Plaintiff could have commenced suit on May 1st and recovered therefor.* This circumstance of itself is enough to show that the condition for payment of the April salary was entirely independent of the other condition under discussion. Being independent, it was not

necessary that plaintiff should either plead or prove performance thereof.

Pollack v. *Brush, etc., Assn.*, 128 U. S. 452;
Deacon v. *Blodgett*, 111 Cal. 416;
Purser v. *Eagle Lake Co.*, 111 Cal. 139, 144.

Other considerations lead to the same conclusion. The sum of $1,000 clearly was due to plaintiff on April 30th; otherwise plaintiff could not have sued therefor on May 1st. And it was due in June when the first deduction was made by plaintiff. The Code of Civil Procedure (Sec. 440) says that when cross-demands exist, so that if one party should commence an action the other party might set up a counterclaim, such demands shall be *deemed compensated* to the extent to which they equal each other. Plaintiff was therefore entitled in June to offset his demand for the April salary against the amount then due the defendant companies. It was unnecessary that he should pay them the amount withheld in June ($484.03) and then demand of them its repayment. Instead of so doing, it was his right, if he chose, to deduct the $484.03 from the amount defendants owed him, and he cannot be charged with any default because he exercised such right.

Not only is this so, but in April, 1907, as we have seen, the defendants definitely repudiated the contract and denied all liability on their part thereunder. When this occurred, it is conceded that plaintiff was not in default in his contract in any particular. After the repudiation he was not required to either perform, or offer to perform. For this reason, the default in June

was altogether immaterial, and furnishes no defense to this count.

Gray v. *Smith* (C. C. A. 9th Cir.), 83 Fed. 825;
Scribner v. *Schenkel,* 128 Cal. 250;
Pierce v. *Lukens,* 144 Cal. 397.

With the statement of one additional reason why plaintiff was entitled to recover the April salary, we will pass from this subject to the fourth count of the complaint. Contracts often require that each party shall perform a number of different acts, but it by no means follows that a non-performance of one of them is intended by the parties to result in a forfeiture of all of the rights of the party who has thus failed to keep the contract in its entirety. It is elementary law that where a covenant is *independent,* which is always the case where it is to be performed, or may be performed, *after* another (*Bush* v. *Stromberg, etc., Co.,* (C. C. A. 8th Cir.), 217 Fed. 325, 333; *Donovan* v. *Judson,* 81 Cal. 338; *Goldsborough* v. *Orr,* 8 Wheat. 218; *Quinlan* v. *Green County* (C. C. A. 6th Cir.)—a failure to perform it results only in making the party who has failed to perform liable to compensate the other party in damages—not that the latter shall be entirely excused from performance of his obligations under the contract.

Kauffman v. *Raeder* (C. C. A. 8th Cir.) 108 Fed. 171;
Central, etc., Co. v. *Buchanan,* 73 Fed. 1006; (Taft, J.)
Samson v. *Somerset,* 6 Gray, 120. 122;
Turner v. *Konvenhoven,* 100 N. Y. 115;
Ernst v. *Cummings,* 55 Cal. 179.

3. *The evidence was sufficient to justify the court in finding that plaintiff was entitled to recover the amount paid out by him representing commissions on unearned premiums.*

The fourth count, as already stated, is based not upon the written contract, for the latter is silent with respect to any matters connected with the return of premiums, but upon an implied contract to repay moneys laid out and expended by plaintiff for defendants' benefit. The evidence shows without conflict the amount of such payments ($237.45) (Tr., pp. 71, 72) and the course of business between plaintiff and defendants pursuant to which they were made. It is not claimed that defendants ever made any objection to this course being pursued, or to plaintiff's making such payments on their behalf, but, on the contrary, it shows that the latter at all times received the benefit thereof. If, therefore, it could be shown that the payments were originally made without authority, yet defendants clearly ratified the same.

V.

ANSWER TO ARGUMENTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

In a preceding subdivision of this brief, we have endeavored to show that the sole matter which is reviewable upon this record is the order of the lower court overruling the demurrer to the complaint. (*Supra*, pp. 9 to 11). If we are correct in this, it is apparent that almost all of the discussion contained in the brief of plain-

tiffs in error is directed to questions with which this court is not concerned. Notwithstanding this, in the following pages, we shall endeavor to answer all of the arguments advanced by plaintiffs in error in their brief, without, however, intending any abandonment of our position that the questions discussed by opposing counsel (save that relating to the sufficiency of the complaint) are without the jurisdiction of this Court.

Throughout the brief of plaintiffs in error, we find the assertion repeatedly made in one form or another, that plaintiff cannot recover because at the first trial of this case, and in this Court on the former appeal, he took the position that he had performed the contract. In the same connection it is urged that the "law of the case" has in some way been established contrary to the contentions now urged by us.

The complaint, however, as originally filed in this court, and as it now stands, contains a count based upon performance (Count III-Tr. pp. 13-15), *and also one based upon defendants' repudiation* (Count II-Tr. pp. 10-13). At the former trial, as we have already pointed out, the Court, at the request of the defendant companies, charged the jury that plaintiff had "elected to rely upon his performance" of the contract (199 Fed. 410, 411), and then proceeded to instruct them that in order that plaintiff might recover, it was necessary that he should have fully performed, etc. As a consequence, none of the issues offered by the second count were involved or determined either in the lower court or in this court on the former appeal. For every purpose,

the case upon the former trial and appeal stood as one in which no claim was made for damages based upon defendants' repudiation of the contract.

Upon the last trial, recognizing that the decision upon the former appeal determines that there can be no recovery under the third count, we make no claim thereunder. That count, therefore, is as effectually removed from this case as the second count was upon the first trial. The issues upon the last trial, it is therefore clear, are entirely different from those involved on the former trial and appeal.

Not only were the issues and questions which were involved upon the first trial and appeal entirely different from those now involved—which circumstance, we take it, is sufficient answer to the claim that the "law of the case" was determined against plaintiff upon the first appeal (2 Hayne on New Trial and Appeal, p. 1669) —but also, at the second trial, additional evidence was introduced. (Tr. pp. 80-85). Besides, the "law of the case" applies "only to principles of law announced in a case and not to mere questions of fact"; and, therefore, even had this court upon the former appeal expressed an opinion as to the facts, this would not have been binding upon the lower court upon the new trial, nor upon this court upon this appeal. We may add, in view of the statement on page 11 of the brief for plaintiffs in error, to the effect that this court having decided against plaintiff upon the former appeal, it is bound to decide against him upon this appeal, that it is well established that "the law of the case" can never be invoked except-

ing as to such matters as were *actually considered and determined* by the appellate court. See in this connection 2 Hayne on New Trial and Appeal, p. 1674; *Wixon* v. *Devine,* 80 Cal. 385, in which it was said that because the doctrine tended to prevent a judicial consideration of the case, "its application would not be extended beyond the cases in which it had been held to apply," and *Mattingly* v. *Pennie,* 105 Cal. 516, (opinion by Judge Van Fleet).

We think that it is not improper to add, in this connection, that it was the intention of Mr. W. S. Goodfellow, who, at the first trial, tried the case on behalf of the plaintiff, that it should be submitted to the jury under all four of the counts, and that he had not intended to elect, or considered that he had elected, to proceed under the first, third and fourth counts, to the exclusion of the second. When, however, the court charged the jury as just stated, no objection was made for the reason that it was then considered that the evidence was ample to sustain a verdict under the third count.

On page 12 of the brief of plaintiffs in error, it is said, "Plaintiff having admittedly failed to perform the contract, the only remaining question is, was he excused from performing by reason of any act or omission on the part of the companies. *The evidence shows only one act of omission, namely, their refusal to pay the sum of $1,000 per month when the same became due.*" In the same connection, the cases of *Cox* v. *McLaughlin,* 54 Cal. 605, and *Palm* v. *Ohio, etc., Railroad Co.,* 18 Ill. 219, are cited. (Brief for Plaintiffs in Error, page 13).

The persistency shown by opposing counsel in endeavoring to reform the evidence to fit a rule of law which has no application to this case, is worthy of a better cause. The plain distinction between the cases cited and the one at bar is that in the case under consideration the evidence shows—not merely a "refusal to pay the sum of $1,000 when it became due," i. e., a failure to perform—*but a repudiation by defendants of the contract.* See *Supra,* pp. 21 to 32.

Cox v. *McLaughlin* (cited on page 13 of the brief for plaintiff in error) went to the Supreme Court a great number of times. Cox had a contract with McLaughlin to build a railroad. The work was to be paid for in instalments. The court, nevertheless, held the contract to be one and entire. After Cox had built the first twenty miles, he demanded his instalment and McLaughlin failed to pay. *He did not, however, repudiate the contract nor deny his liability, or his intention to carry out the contract in the future.* In one of the cases it appears that he was in fact raising the money in New York. (76 Cal. 76). Cox treated this failure to pay the overdue instalment as a prevention from completing the subsequent portion of his contract. His letter to McLaughlin appears in Volume 44 of the Reports at page 20, and the reply of McLaughlin appears on the same and next page. In his various appeals (52 Cal. 592, 54 Cal. 605, 63 Cal. 195), Cox persisted in suing upon the contract to recover the contract price. The Supreme Court continuously held that he could not so recover without performance or tendering performance which

had been prevented, and that the non-payment of an overdue indebtedness by McLaughlin was not prevention of performance. Finally, in 76 Cal. at page 60, he amended his complaint and was allowed to recover, not the contract price, but on a *quantum meruit,* the value of the work he had performed. Throughout the cases, McLaughlin's position was that the contract had not been repudiated.

In the case reported in 52 Cal., the distinction between a repudiation of the contract and neglect or inability to comply with it was noted. At the top of page 596, the Court says that there was no finding or evidence that McLaughlin "prevented, by notifying plaintiffs that he would pay *none* of the instalments as they should become due," and on page 597, *Hale* v. *Trout,* 35 Cal. was distinguished upon the ground that in that case the defendants repudiated the contract.

The case of *Palm* v. *Ohio, etc., R. R. Co.,* 18 Ill. 217, cited in defendants' brief, p. 17, was decided upon precisely the same principle as *Cox* v. *McLaughlin.* In neither case was there any repudiation of the contract by defendant. All that was claimed by plaintiff was that there was a mere failure to pay instalments as they became due. This, of course, was not the equivalent of a repudiation of the contract. All this is very clearly pointed out in the later case of *Lake Shore R. R. Co.* v. *Richards,* 152 Ill. 59, 30 L. R. A. 50, where the Palm case is referred to and shown inapplicable upon the facts.

It is further contended in this connection that the action of defendants did not amount to a repudiation

for the reason that the defendants notified plaintiff that they would take his business and would, as to compensation, settle with him according to the outcome of the litigation in the State Court. It is no disputed, however, that the "legal determination" spoken of in the letter of defendants' counsel could not have been had until after the contract would have expired. (Tr., p. 68.) How idle, then, was this statement made in the letter? It amounted merely to a declaration that defendants would pay if, and when, they were compelled to by final judgment of the courts; but this was true, without any declaration of the parties. Can a party to a contract state and reiterate (as these defendants admittedly have on every occasion—in season and out—from shortly after the earthquake until long after the expiration of the contract) that he is not bound by a contract and will not perform its obligations on his part to be performed, and then nullify the effect of his declaration as a repudiation by adding to it the truism that if the courts make him pay, he will pay? A mere statement of the contention now made, we submit, is its own refutation.

On page 15, the case of *Tatum* v. *Ackerman*, 148 Cal. 357, is cited. Clearly, however, it lends no support to the position of plaintiffs in error. What was there decided is shown by the sentence (which follows the quotation from the opinion found on page 15 of the brief of plaintiffs in error), reading: "In such cases, (i. e., when, before performance is due on the part of one of the parties to a contract, he gives notice to the other than he will not perform) *when performance on his part is due*, and not

before, if such notice is not retracted, the other party may enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." (p. 160.) In other words, the court holds merely that section 1440 of the Civil Code does not authorize the commencement of an action *before performance is due.* Here, the action was commenced after the expiration of the term of the contract, and therefore after performance was due.

In the second subdivision of their brief, plaintiffs in error state that, "the theory upon which counsel for de-"fendant in error proceeded at the second trial is that "Levy at the expiration of the first year of the contract "treated the rescission by the companies *of the year pre-"vious* as a renunciation and elected to consider the con-"tract terminated and to sue once and for all for dam-"ages." (Brief for plaintiffs in error, p. 15.) In view of what has been said, it is hardly unnecessary for us to comment upon the inaccuracy of this statement. As has been pointed out, the renunciation by defendants was persisted in month by month during the entire term of the contract.

Pages 15 to 20 of the brief of plaintiffs in error are devoted to an attempt to show that plaintiff did not accept defendants' renunciation of the contract. In this connection it is suggested that Levy not having adopted the repudiation in June, 1906, could not do so in May, 1907. No authority, it may be observed, is cited in support of this contention. As we have pointed out, there was a continuing rescission each month and a continuing

refusal to pay his salary each month, and it is plain that as he had a remedy each month he could select any the law allowed. He could, in May, 1907, for the first time cease to treat their renunciation as *brutum fulmen* (L. R. 16 Q. B. D. 473), and then treat it as serious, and consider the defendants guilty of a final breach.

Canada, etc., Co. v. *Flanders,* 165 Fed. 321.

That plaintiff "adopted" the renunciation of defendants, and at all times thereafter insisted upon and asserted his right to recover therefor, we refer the court to the correspondence between the attorneys for the respective parties, (Tr. pp. 77, 78, 11); to the fact that in the month following this exchange of letters, plaintiff commenced his suit in the Superior Court as for a total breach of the contract, and for all damages accrued and to accrue (Complaint para. XVIII-Tr. p. 12), which suit he continued to prosecute at all times during the remainder of the term of the contract, and until its dismissal in August, 1910 (Complaint para. XVIII-Tr. p. 12); and to the fact that shortly after such dismissal he commenced this action and again set forth therein his claim that defendants had repudiated the contract. Because at the first trial of this case, *which was held long after the contract had expired,* his counsel mistook the legal effect of his previous acts, and considered that they constituted performance, when in point of law (as determined by the opinion of this Court upon the former appeal) they did not, can it be said that he has lost his cause of action? This claim of defendants finds as little support in justice as it does in authority.

Agar v. *Winslow*, 123 Cal. 590;
Brown v. *Fletcher*, 182 Fed. 973 (C. C. A. 6th Cir.)

On page 23 of the brief for plaintiffs in error the case of *Johnston* v. *Milling*, 16 Q. B. is cited. Though we think there can scarcely be a shadow of doubt that defendants in the case at bar in the most unequivocal manner repudiated, and continued at all the times in question to repudiate and renounce the contract, we quote the following from the opinion in that case for the purpose of showing what is meant by the term "repudiation" as used therein. It is there said: "It is necessary that plain-"tiff's language should amount to a declaration of inten-"tion not to carry out the contract or that it should be "such that defendant was justified in inferring from it "such intention." In the face of the evidence in this case, and the admissions made in the pleadings and by defendants' counsel at the trial, who can doubt either that defendants declared their intention not to carry out the contract or that Mr. Levy so understood them? That the latter accepted their repudiation, we submit, is equally clear. (See *Supra*, pp. 23 to 28.)

The case of *Dingley* v. *Oler*, 117 U. S. 500, cited on page 17 of the brief for plaintiffs in error, has no application to the case at bar. In that case, the defendants were entitled, under the contract to deliver ice to plaintiffs at such times during the year 1880 as they (defendants) should elect (117 U. S. 501). In July they wrote the plaintiffs declining to make delivery then, but stating that they would ship it later during that season when

the price was lower than it then was. The court held, therefore,—and properly held—that there was no renunciation of the contract. How different this case is from the one at bar is evident when it is considered that in the present case, the defendants, as is admitted in the pleadings and shown without conflict, by the testimony, repeatedly asserted and claimed during the entire last eleven months of the term of the contract that the contract had been rescinded, and that they would not be bound thereby.

In *Hanson* v. *Slaven,* 98 Cal. 379, there was no repudiation of the agreement. On the contrary, defendant expressly stated to plaintiff that the latter "will get his stock. . . . I will give him his stock" (p. 382). This, the court said "was a promise to deliver the stock at a future day, and indicated a perfect willingness to deliver it." In the case at bar, the situation was entirely different, for defendant, as we have pointed out, at all the times in question *denied the validity of the contract,* "claiming and asserting, as alleged in paragraph VIII of the complaint, and not denied in the answer," that the said agreement was no longer in force or effect and that they would not perform on their part any of the obligations thereof. (Tr., pp. 5, 11, 84.) In the face of the record we are totally unable to see how opposing counsel can claim that defendants' refusal to perform was not "explicit and positive."

On pages 18 and 19 of the brief for plaintiffs in error it is said—and the statement is repeated many times in the course of their brief—that Levy could not "after the

expiration of one year," consider the action of the attempted "rescission as a repudiation." It seems hardly necessary to point out that the record shows that this repudiation by defendants occurred not only in June, 1906, as is attempted to be claimed by defendants, but that it was made and persisted in month by month during the entire period in question. As we have already pointed out, this is admitted in the pleadings, and is established by all of the evidence in the case and by the admissions made by defendants' counsel at the trial.

On page 19 of the brief for plaintiffs in error, three circumstances are stated, which are said to show that Levy was attempting to perform the contract during the second year. Though we think this argument has already been sufficiently answered in the preceding pages, we add the following:

First, as to the circumstance that Levy placed all of the business which he was able to secure with the defendants. That he continued business relations with defendants after April, 1907, is entirely immaterial. As pointed out, he was not obliged to move elsewhere, or to refrain from all relations with the companies, upon pain of losing his cause of action. It is enough that the transactions which he had with the defendants after the end of April, 1907, were not had *under the contract,* and as is now firmly established as the "law of the case," did not constitute performance thereof.

Defendants cannot claim that they received the business placed with them by plaintiff during this period under a contract, the existence of which they at all times

deny; nor can they now be permitted to assert what this court has denied, namely, that plaintiff performed the contract during the period under discussion.

As stated by Judge Van Fleet in his opinion:

> "It is not by what plaintiff hoped to accomplish by his acts that the result is to be determined, but by the legal effect of what he did; and although plaintiff's course did not, as he evidently hoped, constitute in law a performance, this result cannot militate against his right to have those acts construed, if they are otherwise sufficient, as entitled him to maintain the alternative right to recover as for a breach. He had suffered a wrong through defendants' renunciation of his contract, and finding that he could not change their attitude in that regard he determined to treat it as a breach and proceed in a manner that would enable him to have recompense for their default in one form or the other. In this there was no wrong to the defendants. It was but a precaution to protect himself from loss by reason of their refusal to carry out their contract." (Tr., pp. 88, 89.)

The inferences drawn by the trial court from the evidence in this connection, we submit, were within its province, and were the only inferences which could properly be drawn therefrom.

As to the third circumstance referred to on page 19 of the brief for plaintiffs in error, namely, the making of a monthly demand for payment. As we have already pointed out, the testimony of Mr. Conroy was that this demand was not made during the second year. (Tr. p. 82.) This circumstance, we think, renders it unnecessary to make further answer to this contention. We may add

that even if made, there is nothing to show whether it was for liquidated or unliquidated damages.

In the third subdivision of the brief of plaintiffs in error, it is claimed that the judgment is excessive, for the reason that it "was computed by allowing Levy $1,000 per month during the last eleven-month period of the contract between himself and the companies with interest from the date that each instalment of $1,000 would have become due under the contract." (Brief for Plaintiffs in Error, p. 20.) Though clearly the amount of the judgment is not a question which is open for review here (see authorities cited, *supra,* pp. 10, 11 and *Southern Pacific Co.* v. *Cavin* (C. C. A. 9th Cir.), 144 Fed. 348, 352), we beg to point out that opposing counsel are in error in their statement relative to the way in which the amount of the judgment was computed.

As stated by Judge Van Fleet in his opinion, the basis of recovery was not in dispute (Tr. p. 89). Though the amount of damages recoverable under the second count was unliquidated, it was expressly agreed in court by counsel for both sides when the question whether the case should be tried by the court or by a jury was under discussion, that the proper basis of recovery under the second count, in the event that plaintiff was entitled to judgment thereunder, was the difference between $11,000 and the several sums plaintiff received in the form of brokerage, aggregating $3588.88, together with interest. Upon this statement being made, it was considered by us that a jury was unnecessary, and it was agreed that it might be tried by the court without a jury.

In order that the correctness of the computation may be seen, we submit the following:

Salary for April, 1907	$ 1,000.00
Amount of damages sustained by plaintiff on account of defendants' repudiation of the contract during the last eleven months thereof, $11,000, less $3588.88	7,411.12
Amount of commissions on return premiums	237.45
Interest as prayed (Tr., p. 52)	5,432.96
	$14,081.53

It is said, however, in connection with the amount of the unliquidated damages allowed under the second count, that there should have been deducted the amount of office expenses incurred by Levy. This, we submit, would not be just, since defendants admittedly received the benefit of the services of Levy and his office force, including M. S. Levy. (Tr., p. 74.) Even, however, were the case otherwise, it is clear that there is nothing in the record to show the amount of these expenses. That the burden of proof in this regard rested upon defendants is well settled.

See cases cited, 26 Cyc. p. 1006.

On page 22 of the brief for plaintiffs in error, after quoting what is termed the trial court's "interpretation" of the complaint, it is said: "This is the very situation "which our courts have uniformly condemned." Whatever the rule may be in other States, in this State it is firmly established that a plaintiff may state his cause of action in inconsistent counts, and the Supreme Court

has held that it is error to require him to elect between them and rely upon one only.

Rucker v. *Hall,* 105 Cal. 429.
Stockton, etc., Works v. *Glenn Falls Insurance Co.,* 121 Cal. 171.

The effect of a contrary rule, it is said, would be "to "require him to hazard a guess as to the case he had "made out" (12 Cal. App. 751). The justice of the rule is well illustrated by this case. We may add, in reference to the quotation on page 22 from the case in 107 Cal. 254, that it clearly has no application to a case where the inconsistent causes of action are set out in distinct counts, as in the case at bar.

At the bottom of page 22 of the brief for plaintiffs in error, it us urged that it is "the duty of plaintiff in an "action where he pleads both performance and non-per- "formance to elect at the trial upon which theory he in- "tends to proceed, and thereupon he is bound by such "election." The authorities, however, are otherwise.

Agar v. *Winslow,* 123 Cal. 590;
Brown v. *Fletcher,* 182 Fed. 973.

The brief of plaintiffs in error closes as it opens, with the assertion that the decision of this court upon the former appeal is to the effect that proof of performance is necessary; that the record upon the last trial is the same as that upon the first trial, and that we are consequently concluded by the "law of the case" as made upon the former appeal. In reply, we again point out that the issues offered in the second count relative to de-

fendants' repudiation of the contract were not before the jury for consideration upon the first trial, having been withdrawn from them by the charge (199 Fed. 410, 411); that consequently, the record before this court on the former appeal was similarly limited, and that the issues and record upon the last trial and upon this appeal are entirely different from those presented on the former appeal.

For the reasons stated, it is respectfully submitted that the judgment should be affirmed.

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